

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

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Case Title: Judith A. Short, et al. v. Citi Financial Mortgage

Case Number: 04-01201

Document Information

Description: Order Dismissing Adversary Proceeding .

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
JUDITH ARLEEN SHORT AND
CECIL DWAIN SHORT,
Debtors.

Case No. 7-04-16556 SR

JUDITH A. SHORT, et al.,
Plaintiffs,
v.
CITI FINANCIAL MORTGAGE,
Defendant.

Adv. No. 04-1201 S

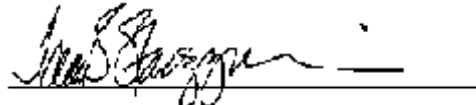
ORDER DISMISSING CASE

This matter is before the Court sua sponte. At the initial pretrial conference held on December 7, 2004, the Court informed Plaintiff's counsel that he could provide legal support for the position taken in the complaint within one week, and if no support were forthcoming, the Court would consider a sua sponte dismissal. Counsel has not provided any support.

The Court finds that the complaint should be dismissed. First, the complaint seeks to avoid a "preferential lien". The Debtors have no standing to avoid preferences; under 11 U.S.C. § 547 the trustee must pursue recovery of preferential transfers. Second, the complaint is captioned "Complaint under Section 522(f) to avoid lien which impairs and [sic] exemption." Bankruptcy Rule 4003(d) states that a procedure

by a debtor to avoid a lien on exempt property under section 522(f) "shall be by motion in accordance with Rule 9014." Therefore, no adversary is required. Third, Section 522(f) allows a debtor to avoid a lien only if the lien is "a judicial lien" (§ 522(f)(1)(A)), or "a nonpossessory, nonpurchase-money security interest" in certain described items of personal property (§ 522(f)(1)(B)(i)-(iii)). The lien described in the complaint is a second mortgage given to Defendant and is neither a judicial lien nor a lien on personal property. Finally, presumably a second mortgage is a voluntary transfer of property to the mortgagee. A debtor may not exempt property that has been voluntarily transferred before the petition. See 11 U.S.C. § 522(g). Therefore,

IT IS ORDERED that this complaint is dismissed.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on December 16, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Eric D Dixon
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